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In the Supreme Court of the United States

OCTOBER TERM, 1978

ROY DAVISTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court's instructions constituted reversible error in that they permitted the jury to convict for a conspiracy not alleged in the indictment.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of two counts of using a telephone to facilitate the unlawful distribution of heroin (Counts 15 and 25), in violation of 21 U.S.C. 843(b), and one count of conspiracy to distribute heroin (Count 1) in violation of 21 U.S.C. 846. Petitioner was sentenced to concurrent terms of three years' imprisonment and was fined $2,000. The court of appeals affirmed without opinion (Pet. App. A).

1. The indictment charged a single large-scale conspiracy consisting of Martel Inmon, petitioner, and several others, to distribute heroin in the Pittsburgh area. Inmon, the wholesaler, sold bulk shipments of heroin to several key distributors, including petitioner. The distributors in turn supplied the retail level "street pushers."

The evidence presented at petitioner's trial was limited to Martel Inmon and his key distributors; no other drug network or criminal operations were ever mentioned at trial. What was shown was that, on several occasions, petitioner had purchased large quantities of heroin from Inmon, a major heroin dealer in the Pittsburgh area, for amounts ranging from $18,000 to $25,000 per purchase. The evidence consisted chiefly of recordings of telephone conversations between petitioner and Inmon. The recordings included a discussion of the problems Inmon was experiencing in obtaining high quality heroin for petitioner from his supplier in California (Tr. 247); petitioner's description of the arrest of several of his own drug pushers (Tr. 325); petitioner's order for more heroin and quinine to dilute the substance to street value (Tr. 327-328); Inmon's statements that his other workers had high praise for petitioner (Tr. 330-331); and Inmon's offer of a portion of a large heroin shipment to petitioner for redistribution (Tr. 245-251). Petitioner also accepted Inmon's offer to broker a particularly large drug transaction for him, involving six to eight "pieces" of heroin at $18,000 per piece (Tr. 249).

2. Asserting that the evidence showed at most a conspiracy between Martel Inmon and himself, petitioner now assigns as error the following portion of the trial judge's instructions:

> Now, although the indictment charges a single conspiracy, Count One of the indictment, it would be possible to find more than one conspiracy, one

> relating to Martel Inmon and the Defendant, Roy Daviston, and others relating to Martel Inmon and other people. Whether there was one conspiracy, more than one conspiracy, or no conspiracies at all, is a factor for you to determine in accordance with these instructions. If you find beyond a reasonable doubt that there was a conspiracy in which Mr. Daviston participated in, you find him guilty; if you find him not involved in any conspiracy, you find him not guilty as to the conspiracy count (Pet. 5-8).

Petitioner contends that this instruction violated substantial rights in that "it constituted an amendment to the indictment which substantially broadened the conspiracy count" (Pet. 7). The claim is flawed.

On the one hand, the evidence was sufficient to support the charge of a single conspiracy of which petitioner was a member. Recordings of telephone calls from each member were introduced in evidence showing a large scale heroin distribution network with Martel Inmon at its center and various operatives at petitioner's level near the core of the conspiracy. Moreover, an inference of cooperation between the co-conspirators could be drawn from Inmon's offer to petitioner of as much of a particular shipment as he wanted before it was distributed among the rest of operatives, as well as Inmon's request that petitioner personally broker one of Inmon's large quantity sales to one of the operatives (Tr. 245-251). As the Third Circuit stated in *United States* v. *Klein*, 515 F. 2d 751, 753:

> [A] party who associates himself with an ongoing conspiracy may become a party to that agreement, either expressly by agreement or implicitly by acts done in furtherance of that conspiracy * * * By acting in furtherance of the co-conspirators' goals with knowledge of the improper purpose, the jury

> can reasonably infer that the new member has achieved a tacit agreement with members of the ongoing conspiracy.

See also *United States* v. *Agueci*, 310 F. 2d 817, 827 (C.A. 2), certiorari denied, 372 U.S. 959. On its facts, therefore, this case is wholly different from *Kotteakos* v. *United States*, 328 U.S. 750, 755, where "[t]he proof * * * admittedly made out a case, not of a single conspiracy, but of several."

On the other hand, if it be assumed that more than one conspiracy was established, the variance did not prejudice petitioner. See *Kotteakos* v. *United States, supra*, 328 U.S. at 765. As the Second Circuit has more recently put it in *United States* v. *Agueci, supra*, 310 F. 2d at 827:

> [T]he test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). *The material inquiry is not the existence but the prejudicial effect of the variance.* While we believe, as we have already stated, that the jury could find there was but one conspiracy, the finding of more than one conspiracy would not result in [any] prejudice * * * [emphasis added].

Here, petitioner makes no claim that he was entitled to a severance, or that evidence admissible only on a single conspiracy theory was used against him. In these circumstances, substantial rights were not adversely affected by any variance between indictment and proof. See *Berger* v. *United States*, 295 U.S. 78, 81-84.

Perhaps the district court ought not have expressly charged the jury that it might convict so long as it concluded that petitioner was party to a conspiracy, albeit one smaller than the single conspiracy alleged. But if a verdict so grounded is immune from challenge—because

the variance was insubstantial—the result cannot be different because the court explicitly permitted it. In the present context, the instruction was, at most, harmless error. Compare *Stirone* v. *United States*, 361 U.S. 212.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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[1]In any event, concurrent sentences were imposed for the conspiracy and the substantive counts, the validity of which are not contested. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

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